Supreme Court, U.S.
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In The Supreme Court of the United States

ELLY GROSS, et al.,

Petitioners,

v.

THE GERMAN FOUNDATION INDUSTRIAL INITIATIVE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF

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INTRODUCTION

Respondents claim that this case does not warrant the Supreme Court's attention because the Berlin Agreements are unique. But, in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), at the behest of one of the respondents,[1] the Court reviewed the effect of the Berlin Agreements on state regulatory power. Surely, the significance of legal issues arising under the Berlin Agreements does not turn on whether a respondent won or lost below, or on whether the Berlin Agreements are being enforced as a ceiling or a floor. Respondents also argue that no issue of federal law is present. But, the Berlin Agreements are so infused with national interest that their enforcement is governed by federal common law. See *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988).[2]

I. RESPONDENTS' PROMISES TO THREE FEDERAL JUDGES GENERATED A LEGALLY ENFORCEABLE OBLIGATION

Respondents promised three federal judges that they would comply with the financial commitments codified in ¶4 of the Joint Statement (including the

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[1] Five affiliates of respondent Allianz SE are listed as members of the American Insurance Association, the petitioner in *Garamendi*.

[2] Petitioners asserted jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1332(a)(2) (alienage) in both lower courts.

payment of "appropriate interest") if pending Holocaust-era cases were dismissed with prejudice.[3] In reliance on the promises, the three judges dismissed more than 60 cases. Respondents now claim that the courtroom promises were without legal effect, arguing that if the parties did not intend to make respondents' financial obligations judicially enforceable, respondents' subsequent promises to federal judges cannot render them judicially enforceable. Op. Cert. 25-26. Respondents confuse "implied in fact" contracts with contracts "implied in law."[4]

Virtually every exercise of quasi-contract or equitable or judicial estoppel involves an otherwise unenforceable promise that becomes judicially enforceable because the subsequent behavior of the obligor renders it unjust to fail to enforce the promise. In this case, respondents knowingly induced three federal judges to confer valuable legal benefits on them by promising to comply with the financial obligations

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[3] The promises are described in the Petition for Certiorari (Pet. 28-29).

[4] See 1 Williston on Contracts § 1:6 (4th ed. 2002):

> *There are two kinds of implied contracts, one implied* in fact and the other implied in law: the first does not exist unless the parties manifest mutual assent . . . while the second is quasi or constructive, and does not require mutual assent but is imposed . . . to enable justice to be accomplished, even when no contract was intended by the parties. . . . [I]t may even be imposed in the face of a clearly expressed contrary intent if justice so requires.

codified in ¶4 of the Joint Statement. Such promises, coupled with receipt of the valuable benefits the promises were designed to induce, generate an enforceable legal duty to abide by the courtroom promises in order to prevent unjust enrichment. See *Zedner v. United States*, 547 U.S. 489, 503-6 (2006) (discussing judicial estoppel); *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996) (distinguishing between contracts implied in fact and contracts implied in law).

In an effort to avoid the consequences of their promises, respondents quote Judge Bassler out of context. Op. Cert. 26. But Judge Bassler was merely noting that respondents' promise to pay "appropriate interest" does not bind them to accept petitioners' version of what constitutes "appropriate interest." Respondents also claim that they received little of value in return for their promises because the victims' legal claims were virtually worthless. Op. Cert. 5. Respondents even mischaracterize their multi-billion dollar payment to the German Foundation as a voluntary contribution. Op. Cert. 3. Respondents' claim that they should be viewed as voluntary donors is patently false. The victims' legal claims were deeply threatening to respondents, who made a calculated economic decision to buy "legal peace" for a "fair price."

For example, petitioner Elly Gross was the plaintiff in *Gross v. Volkswagen*, No. 98-4104 (D. N.J.), an action on behalf of slave laborers. Her substantive causes of action for restitution, prevention of unjust enrichment, and violation of customary

international law banning slavery and torture were enforceable in federal court. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). The facts were provable through surviving records; the London Debt Agreement of 1953 tolled the running of applicable statutes of limitation; and *in personam* and subject matter jurisdiction was present. While Judge Debevoise ruled that that the 2+4 Treaty impliedly extinguished the victims' legal claims, *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D. N.J. 1999), lawyers for both the State and Justice Departments rejected Judge Debevoise's erroneous reading of the treaty, and were prepared to support petitioners' appeal.[5] Counsel herein withdrew the appeal with prejudice only after respondents promised to abide by their financial commitments in the Joint Statement.

II. RESPONDENTS ADVANCE AN EXCESSIVELY FORMALISTIC READING OF *GARAMENDI*

Respondents argue that *Garamendi* enforced the Executive Agreement, not the Joint Statement. Op. Cert. 20. But *Garamendi* was about conflict preemption – the displacement of one set of substantive norms by another. Since no substantive norms are codified in the Executive Agreement, the only source

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[5] See Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* 245-46, 270-74 (Public Affairs 2004).

of federal norms in *Garamendi* was the financial bargain codified in ¶4 of the Joint Statement. *Garamendi* holds that the Executive Agreement causes the terms of that bargain to displace California's more generous norms. In short, *Garamendi* enforced the Joint Statement as a ceiling.

III. RESPONDENTS' PRIVATE FINANCIAL PROMISES ARE NOT PRESUMPTIVELY UNENFORCEABLE

In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), all nine Justices rejected a presumption against the judicial enforceability of private rights codified in international agreements. Nevertheless, respondents insist that their financial commitments are presumptively unenforceable because they are codified in a hybrid international document signed by both private parties and sovereigns. Op. Cert. 24. Read neutrally, in accordance with *Medellin*, the private economic nature of respondents' financial promises, coupled with the careful use of "shall" rather than "will" to describe respondents' financial obligations, demonstrate the parties' intent to render respondents' financial obligations legally enforceable.

The future tense is used 22 times in the Joint Statement, but the word "shall" appears only three times – each time as the only verb used to describe respondents' future financial commitments. "Will" is used to describe every other future event. It is highly unlikely that such a differential use of "shall" and

"will" is random. Respondents argue that the use of "will" to describe the accrual of interest during the deferral period demonstrates the randomness of the text. Op. Cert. 22-23. But respondents overlook the rules of grammar and usage. A sentence describing the future condition of an inanimate subject incapable of volition (funds collected by German industry "will") takes the verb "will." See Pet. App. 229d. A sentence setting forth the required future behavior of an animate subject capable of volitional action ("German companies shall") takes the verb "shall." See Pet. App. 228d.

IV. THE GERMAN FOUNDATION HAS NOT BEEN PERMITTED TO DECIDE WHETHER ADDITIONAL INTEREST IS DUE

Respondents' assertion (Op. Cert. 3) that the German Foundation has determined that no further interest is due is misleading. The German Foundation Law provides for a 27 member Board of Trustees. Op. Cert. App. 4a-5a. One Board seat is reserved for an attorney for the victims. *Id.* In August 2000, counsel of record herein was nominated by the United States as the lawyer-trustee.[6] In February 2002, counsel placed the interest issue before the Board of Trustees. J.A. 0393-95. In the midst of a spirited

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[6] In August 2004, counsel was re-nominated by the United States. In August 2008, counsel declined a third term, but agreed to complete this litigation.

Board debate, a representative of the German government notified the trustees that they lacked power to resolve the interest issue. *Id.* Respondents then obtained an opinion from a Foundation director that no additional interest is due. Directors, however, do not speak for the Foundation on this issue.[7] Moreover, the opining director was a former vice president of respondent Degussa AG, and had been a principal negotiator for respondents.

V. RESPONDENTS MISSTATE THE ROLE OF RULE 60(b) IN THE ENFORCEMENT PROCESS

Respondents argue that since every order of dismissal contains a proviso explicitly stating that it was subject to Rule 60(b), counsel viewed Rule 60(b) as a substitute for judicial enforcement. Op. Cert. 26. But respondents have it backwards. Rule 60(b) is not intended to address situations where the parties disagree over a material, but relatively minor aspect of a settlement. Moreover, since the power to vacate a dismissal exists in every case, formally referencing Rule 60(b) must have been intended to mean something more than the redundant right to invoke Rule 60(b). In fact, counsel hoped that it would satisfy the

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[7] German "directors" function like American corporate officers. They are elected by the Board of Trustees to manage the day-to-day affairs of the entity subject to Board supervision. See Foundation Law, §§ 5(5)-(7). Op. Cert. App. 6a (trustees have power over finances and all "fundamental matters").

requirements announced in *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994) by signaling a need for retained supervisory jurisdiction over the settlement agreement.

VI. JUSTICE HAS NOT BEEN DONE IN THIS CASE

Respondents assure the Court that justice has been done. Op. Cert. 26-27. But the district court's *sua sponte* summary judgment procedure was profoundly unjust. The district court conceded that its *sua sponte* summary judgment order violated the notice requirements of the federal rules, but insisted that the error was harmless. Pet. App. 173c.

Far from being harmless, the district court's failure to permit petitioners time to respond to its concerns unjustly deprived petitioners and Secretary Eizenstat of an opportunity to correct at least three crucial errors: (1) the district court's egregious misreading of the genesis of the interest obligation as set forth in *Imperfect Justice* at 254 (Pet. App. 185c-87c); (2) the district court's erroneous belief that Secretary Eizenstat's end-game negotiating strategy contradicted his sworn declaration (Pet. App. 195c-96c); and (3) the district court's erroneous claim that Secretary Eizenstat had failed to rebut respondents' assertions (Pet. App. 199c-201c). Petitioners were unable to correct these errors because Secretary Eizenstat's declaration was filed eight weeks *prior* to respondents' papers, and the court's scheduling order did not

permit additional filings. See Pet. App 199c-201c; J.A. 0203 (scheduling order).

At the close of oral argument, the district court declined petitioners' suggestion that Secretary Eizenstat be deposed. J.A. 2046-47. Justice requires an opportunity for Secretary Eizenstat to explain: (1) that there was, indeed, an agreement to pay "at least" DM 100 million in post-signing interest (*Imperfect Justice* at 254); and (2) that his end-game negotiating strategy was designed to checkmate respondents' last minute effort to re-open the interest issue that had been closed for months.

Nor was it just for the lower court to deny the victims access to a judicial forum without even discussing the precedential effect of *Garamendi*, or the legal consequences of respondents' promises to three federal judges that "appropriate interest" would be paid if the victims' Holocaust-era cases were dismissed with prejudice.

The Berlin Agreements are a remarkable achievement. The German Federal Constitutional Court demonstrated deep fidelity to the rule of law. Secretary Eizenstat and Graf Lambsdorff provided enlightened leadership. Respondents and the lawyers for the victim-petitioners bargained in good faith. The German Foundation has distributed more than $6.6 billion to more than 1.66 million victims, many of whom have found great solace in their treatment as equals under the rule of law. It is unfortunate that the parties have been unable to resolve this good

faith dispute over post-signing interest. But it would be tragic if the final chapter in the Berlin Agreements was a refusal to allow the victims a fair opportunity to resolve this dispute as dignified equals pursuant to the rule of law.

CONCLUSION

For the above-stated reasons, the petition for certiorari should be granted.

Respectfully submitted,

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